National Steel and Shipbuilding Company *and* Shopmen's Local Union No. 627 affiliated with The International Association of Bridge, Structural, and Ornamental Ironworkers, AFL–CIO and United Waterfront Council of San Diego. Cases 21–CA–30295, 21–CA–30435, and 21–CA–30570

November 7, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On June 5, 1997, Administrative Law Judge Joan Wieder issued the attached decision. The Respondent filed exceptions, a supporting brief and a reply brief, and the General Counsel filed an answering brief.[1]

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, National Steel and Shipbuilding Company, San Diego, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

''(a) Within 14 days from the date of this Order, offer Nancy Becker employment in the burner or torch operator's position for which she applied or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.''

2. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs.

''(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to rehire, and within 3 days thereafter notify the employee in writing that this has been done and that the refusal to rehire will not be used against her in any way.''

3. Substitute the following for paragraph 2(d).

''(d) Within 14 days after service by the Region, post at its San Diego, California shipyard, copies of the attached notice marked ''Appendix.''[17] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 27, 1994.''

4. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act give employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to hire or rehire individuals because they engage in union or other protected concerted activity.

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[1] No exceptions were filed to the judge's granting of the Respondent's motion to dismiss the allegations that the Respondent violated Sec. 8(a)(3)and (1) of the Act by unlawfully discharging employee Mary Anderson, and violated Sec. 8(a)(1) by prohibiting the wearing of ''Take a Break'' stickers.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. Further, the Respondent, in its brief, contends that some of the judge's credibility findings demonstrate bias. On careful examination of the judge's decision and the entire record, we are satisfied that the contention is without merit.

In her decision, the judge cited two other *National Steel & Shipbuilding Co*. cases. We note that *National Steel & Shipbuilding Co*., Case 21–CA–29275 issued on September 30, 1997 (324 NLRB 499), and *National Steel & Shipbuilding Co*., Case 31–CA–21861 et al., issued on 324 NLRB 1034 (1997).

In addition, we grant the Respondent's motion to correct a transcription error. Transcript, p. 1450, L. 8, should read, ''Yes. He said he'd check with the Gibbons Company.'' The word ''with'' was inadvertently omitted.

[3] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Nancy Becker employment in the burner or torch operator's position for which she applied or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Nancy Becker whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to rehire Nancy Becker, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the refusal to rehire will not be used against her in any way.

NATIONAL STEEL AND SHIPBUILDING COMPANY

Robert R. Petering, Esq., for the General Counsel.
William C. Wright and *Theodore R. Scott, Esqs.*, for the Respondent.
Tom McCammon and *David A. Rosenfeld, Esqs.*, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge. This case was tried in San Diego, California, for 7 days in October 1995. The consolidated complaint, as amended at the hearing, alleges that National Steel and Shipbuilding Company (the Respondent) violated Section 8(a)(1) of the Act by prohibiting employees from displaying union-related stickers on their hardhats and by telling an employee not to discuss her drug test with fellow employees or union representatives. The complaint also alleges the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Mary Anderson and by failing to rehire employee Nancy Becker (nee Sears) because they engaged in protected concerted and union activities. The Respondent filed an answer, also amended at the hearing, denying the essential allegations in the complaint. The Respondent, the General Counsel, and the Charging Parties filed briefs, which I have read and considered.[1]

Based on the entire record, including the testimony of the witnesses and my assessment of their demeanor, I make the following

[1] Respondent's motion to strike all or portions of the timely filed brief of the Charging Parties is denied. I have not, however, considered any late filed exhibits, which includes app. A to the Charging Parties' brief since its contents were not submitted as exhibits during the hearing. Respondent moved for dismissal of the complaints. I deferred ruling, and the motion is considered herein.

FINDINGS OF FACT

I. JURISDICTION

Respondent, is a corporation engaged in the operation of a commercial shipyard with its main headquarters and principal place of business located in San Diego, California. Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Charging Parties are admitted to be labor organizations within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Union-Related Sticker Issue*

From late 1992 until the events involved in this case, Respondent and seven labor organizations, including the Charging Party Local 697 (the Union), were engaged in coordinated contract negotiations after the expiration of their most recent collective-bargaining agreements on September 30, 1992. The Union represents over half of Respondent's 2000 to 3000 employees. From late 1992 through about September 1993, and particularly between March and June 1993, Respondent was faced with numerous disruptive strikes, slowdowns, and other job actions, sponsored in part by the Union. Some of this activity was found to amount to unprotected ''hit and run'' strike tactics by Administrative Law Judge Timothy Nelson in his April 22, 1996 decision in Case 21–CA–29275, et al. (JD–(SF)–31–96). That decision is pending review by the Board.[2]

In this case, the parties stipulated to the admission of Respondent's Exhibit 9, which sets forth background facts that are more fully explicated in Judge Nelson's decision. That exhibit confirms that Respondent's Unions encouraged ''slowdowns,'' working ''to the rule,'' and other tactics, referred to generally as the ''inside game.'' The exhibit also confirms that several 1-day walkouts were called by the Unions in April, May, and June 1993 as ''part of [a] pattern of intermittent and unprotected activities.''

On March 1, 1995, employee Michael Farley obtained copies of a sticker produced individually by incumbent union officers running for reelection and paid for by Chief Union Shop Steward Tom McCammon. The sticker reads as follows: ''NASSCO treats you like dirt, so Take a Break and Kick Back Today! Vision 2000 Sucks!''

Farley gave some of the stickers to fellow workers and placed one on his hardhat, which was owned and issued by Respondent. It is uncontroverted that shipyard employees like Farley are not entitled to take breaks during their workday. Farley had worn other union insignia on his hardhat for several months, and no official of Respondent had ever objected. On March 1, 1995, however, according to Farley, Respondent's supervisors objected to the particular sticker referred to above in three separate conversations with him.

In the first conversation, which, according to Farley, took place shortly before lunch, Area Manager John (Kiwi)

[2] See also decision of Administrative Law Judge Mary Cracraft in Case 31–CA–21861, et al. (JD–(SF)–67–96), also pending review by the Board.

Treloar[3] and Foreman Howard Ferguson approached him and other employees who were wearing the sticker on their hardhats. Treloar said he was disappointed that the employees were wearing the sticker and said that ''new employees'' would see them wearing it and say, ''hey we should do what the sticker implies,'' which would ''be bad for them and for NASSCO.'' Farley did not respond to Treloar's remarks.[4]

Later, after lunch, that same day, Treloar allegedly approached Farley and another employee and said that he did not like unions because they had destroyed his native country, which was New Zealand. Treloar did not, however, tell Farley or the other employees to remove the stickers or threaten them if they did not. According to Farley, Treloar again said that ''new employees might look at that sticker and slow down, which would not be good for them or for the company.'' Farley admitted that Treloar was concerned that employees would interpret the sticker ''as an urging to engage in a slowdown and to kick back and to not do their work.'' Farley also did not respond to Treloar's concern on this occasion.

Farley testified to a third conversation, also on March 1, in which he and a fellow employee were told by Ferguson to remove the objectionable sticker from their hardhats. Farley also claimed Treloar tore the sticker off the hat of a coworker named Doan. Doan did not appear and testify. Farley testified Doan told him he did not want to get involved. Also present during this conversation was Assistant Manager Don Edington, whose candid, straightforward testimony about this conversation I credit where it conflicts with that of Farley. After Ferguson asked the employees to remove the stickers, both Farley and the other employee complied. According to Farley, after he removed the sticker from his hardhat, he asked Ferguson, who was his immediate foreman and reported to Treloar, what would have happened had he refused to remove the sticker. Ferguson said that he would have issued Farley a warning for refusing a direct order.[5]

The complaint basically alleges that Respondent improperly ordered that Farley and other employees remove the objectionable sticker from their hardhats.[6] The General Counsel alleges that Respondent's prohibition of the ''take a break'' sticker was violative of Section 8(a)(1) of the Act because sending union-related messages of solidarity is protected activity. Respondent contends that a violation cannot be found in this case because the employees engaged in unprotected conduct since the sticker carries the message that employees should engage in an unprotected partial strike or slowdown. I agree with the Respondent's position. Respondent did not promulgate a rule prohibiting protected conduct.

The message on the objectionable sticker suggests that employees ''take a break,'' contrary to Respondent's policy. Thus, it encourages unprotected slowdowns or partial strikes. See *Highlands Medical Center*, 278 NLRB 1097 (1986). Not only did Respondent's supervisors clearly state that the message would encourage slowdowns when they spoke to Farley, but the context of the labor dispute between Respondent and its unions amply justified their concerns. Respondent had in fact been faced with unprotected slowdowns and other similar tactics in the past. Accordingly, Respondent was well justified in prohibiting Farley and his fellow employees from wearing the ''take a break'' stickers on March 1, 1995. I, therefore, recommend the complaint allegations that such conduct was violative of Section 8(a)(1) be dismissed, and Respondent's motion to dismiss this charge be granted. See *Southwestern Bell Telephone Co.*, 200 NLRB 667, 671 (1972).

B. *Other Alleged Statutory Violations*

1. In general

The General Counsel asserts Respondent violated Section 8(a)(3) and (1) of the Act by refusing to rehire Becker and discharging Anderson because they supported the Union and engaged in concerted protected activities. The complaint further claims Respondent violated Section 8(a)(1) by directing Anderson to not discuss matters concerning her drug test with ''anyone,'' including fellow employees or her designated 9(a) representative.

As here pertinent, Section 8(a)(1) and (3) of the Act provide:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7 . . . .
>
> . . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

The allocation of the parties' respective burdens of proof in proceedings turning on the employers' motivation in taking personnel action was established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert.

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[3] Treloar is sometimes erroneously referred to, in the transcript, as John Lyle.

[4] Farley also testified that Treloar removed the sticker from the hardhat of employee Paul Doan. I do not credit Farley's testimony in this respect. It was not corroborated by Doan, and Treloar credibly denied removing the sticker. Moreover, Farley was a generally unreliable witness who displayed a lack of candor and a strained propensity to support the Union's litigation position. In addition, his other testimony was uncorroborated by employees who were present during the events about which he testified. In sum, Farley did not appear believable and only his unquestioned, unrebutted testimony, as well as his admissions Treloar expressed concern new employees would be influenced to their detriment and the stickers could be interpreted to mean engageing in a slowdown to stop or interrupt work, are credited. Buttressing this finding was Farley's clear inability to clearly recall events and conversations.

[5] Farley testified that he subsequently displayed the same sticker on his lunchbox and no one from management ever said anything to him about it. There was no evidence any of Respondent's agents noticed the sticker.

[6] Pars. 10 and 12 of the complaint offer different versions of the same basic allegation, more generally set forth in par. 11. Thus, par. 10 alleges that Treloar actually removed a sticker. I have discredited Farley's testimony in this respect; that allegation must be dismissed on this ground alone. Par. 12 adds an alleged threat to the mix, namely that Ferguson threatened to discipline employees if they did not remove the objectionable stickers. Although Farley's testimony describes Ferguson's conduct somewhat differently, to the effect that the alleged threat was made after-the-fact, this specific allegation is redundant. If Respondent was correct in prohibiting the stickers, as I find, it certainly was correct in saying that it would punish an employee who defied the prohibition.

denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). In *Wright Line*, the Board provided:

> First we shall require that the General Counsel make a ''prima facie'' showing sufficient to support the inference that protected conduct was a ''motivating factor'' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

In *Manno Electric, Inc*., 321 NLRB 278 (1996), the Board explicated the use of the phrase ''prima facie'' as placing on the General Counsel the ''burden of persuasion.'' Thus, as the court noted in *Southwest Merchandising Corp. v. NLRB*, 53 F.3d 1334, 1340 (D.C. Cir. 1995):

> [T]he General Counsel bears the burden of demonstrating that the employer acted with discriminatory motive throughout the case. Although the Board labels the General Counsel's burden that of establishing a ''prima facie'' case, it has, in fact, traditionally required the General Counsel to sustain the burden of proving that the employer was motivated by anti-union animus.

In proceedings where the employers' motivations for adverse actions are outcome determinative, it is recognized an employer rarely admits unlawful motivation and the Board may infer it from circumstantial as well as direct evidence. *NLRB v. Link-Belt Co*., 311 U.S. 584, 602 (1941); *Birch Run Welding & Fabricating, Inc. v. NLRB*, 761 F.2d 1175, 1179 (6th Cir. 1985). In considering the evidence, the Board may rely on such factors as the Employer's knowledge of Anderson's and Becker's union activities, the Employer's hostility towards the Union, deviations from established employer practices; and the implausibility of the Employer's asserted reasons for its actions. *NLRB v. Transportation Management*, supra at 404–405.

Respondent clearly had knowledge of Becker's and Anderson's union activities. Accordingly, the question is whether Respondent's actions were based on unlawful motivation.

2. The refusal to rehire Becker

Employee Nancy Becker (Nancy Sears, before her marriage in June 1994) was admittedly not rehired by Respondent on and after July 20, 1994, despite other hiring by Respondent in jobs for which she was qualified. Before being laid off in June 1992, she had been a steward for the Union, and retained preferential recall rights to her old position of burner or cutting torch operator for 2 years after her layoff because of her status as a union official. ''[D]iscrimination in hiring is twin to discrimination in firing.'' *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187 (1941).

Although there is some dispute as to the degree of Becker's activism as a grievance filer on behalf of the Union, there is no doubt that she did file and resolve numerous grievances, at least at step one, and was regarded as an enthusiastic and aggressive union steward. After dealing with Becker on a grievance, Jim Pittman, a management grievance representative, told Union Business Agent Robert Godinez that she was crude and abrasive. Godinez considered Becker to be one of the Union's most effective stewards. On another occasion, shortly before she was laid off as a first-shift employee, General Foreman Mike Brichoux told her if she gave up her ''union garbage,'' he could get her on the second shift with him. She replied, ''I won't do that.'' Even though this was a humorous exchange, it illustrates Respondent's knowledge of and attitude toward Becker's outspoken activism on behalf of the Union.

Becker was also a visible and vocal participant in union protests and rallies supporting their bargaining position during the very difficult negotiations between the Respondent and its Unions. Most of those protests and rallies took place in mid- and late-1992 and in early 1993. For example, Becker carried a large poster with a crude reference to Respondent's CEO, Richard (Dick) Vortmann, during a union-sponsored march to his residence. This incident was videotaped and shown on local news broadcasts. On another occasion, Respondent's manager of industrial relations, Carl Hinrichsen, and other management officials were present at a union rally at Respondent's main gate when Becker exhorted employees with a ''bullhorn'' that they did not need to hurry home to get screwed because Respondent was already screwing them at the bargaining table.

During negotiations, Becker was a prominent representative of the Union, despite being on layoff status. On July 31, 1992, Union Business Agent Robert Godinez submitted a letter to Carl Hinrichsen, informing him that Becker would need access to the shipyard on August 3, 1992, because she would be representing the Union as an assistant business agent on that day. Becker did obtain a pass from Hinrichsen's office and spent 5 hours in the shipyard on union business on August 3.

On August 10, Becker appeared at the second or third bargaining session between Respondent and its Unions. She was the official note or minute taker on behalf of the seven-union bargaining team. Hinrichsen, who attended the bargaining session as Respondent's chief negotiator, was surprised to see Becker at the negotiations. He asked what she was doing there and was told she was taking notes. Hinrichsen then asked Becker if she was being paid. Becker responded by asking Hinrichsen if he was ''being paid to do his job.'' He said that it was none of her business and she replied, ''[L]ikewise.'' When asked, Hinrichsen could not explain why he made the inquiry of Becker, at this juncture of his testimony, he did not claim he was concerned Becker was double dipping.

At a subsequent bargaining session, on August 17, 1992, Respondent and its Unions discussed the use of temporary business agents. Hinrichsen objected to the practice, which he described derisively as ''business agents de jour.'' In the course of two angry exchanges on the issue, which are reflected in the minutes of the session, Hinrichsen stated, ''We are not going to allow the Ironworkers Army to continue to go through the yard.'' Considering the record, I find Hinrichsen exhibited hostility toward the Union.

Becker continued to take bargaining notes on behalf of the Unions through April 1993. The record is unclear as to the subsequent course of bargaining, but it does not appear that the parties had reached an overall agreement at the time of the hearing in this case.

In the spring of 1994, Respondent began advertising in local newspapers for burners and cutting torch operators, positions for which Becker was qualified and in which she

worked before her layoff. Beginning on July 20, 1994, and continuing throughout 1994 and most of 1995, Respondent hired employees in those classifications. It did not, however, rehire Becker, even though she submitted several formal applications and others made inquiry on her behalf. Respondent concedes that it had three of Becker's applications in its files and that it considered her August 1994 application, although Becker testified that she had submitted an earlier one in July 1994.

Hinrichsen admitted that Becker's husband, Tom, who also worked for Respondent, talked to him about Becker's application. Becker credibly testified that her husband reported back that Hinrichsen would see what he could do. Union Business Agent Robert Godinez also spoke to Hinrichsen about rehiring Becker. And, in late April 1995, in response to Respondent's request for referrals in several job categories, including Becker's, the Union sent Respondent a letter specifically referring Becker. The letter included a recent application from Becker and a copy of Respondent's personnel action form prepared at the time of her layoff rating her an ''above average'' worker and recommending her rehire. The Union received no response to its letter referring Becker. Finally, Chief Steward Tom McCammon spoke to Hinrichsen about Becker. He had received a copy of her personnel file and pointed out to Hinrichsen that she had been recommended for rehire at the time of her layoff. He specifically asked Hinrichsen why she was not being rehired and Hinrichsen did not respond.[7]

At no time during 1994 and 1995, when Becker's applications were on file, did Respondent tell her, her husband, McCammon, or Godinez why she was not being rehired. They first learned of Respondent's asserted reason for refusing to rehire her at the hearing in this case.

The General Counsel has proved that Respondent refused to rehire Becker because of her union and protected concerted activities. The evidence clearly shows that Becker was a known union steward and activist who was strident in expressing her views. Hinrichsen, who admittedly made the decision not to hire Becker, displayed his own animus toward her because of her stridency on behalf of the Union. The most obvious examples are Hinrichsen's reactions to her having been appointed a temporary business agent and a notetaker on behalf of union bargainers. Especially supportive of the General Counsel's position are the unusual circumstances surrounding the alleged decision by Hinrichsen not to rehire Becker. There is no reason in this record why an application for employment would be submitted to the manager of labor relations, as was done in Becker's case. Indeed, Hinrichsen testified that Employment Manager Woody Breece, whose office ordinarily handled applications, brought it to him and stated that Becker had some kind of ''falling out'' with the Union, which he inferred from what Becker had said on the application. This suggests that Respondent was treating her application differently for union-related reasons. Nor did Respondent, prior to the instant hearing, give an explanation for its refusal to rehire Becker, who had been a good employee in the past and was recommended for rehire when she was laid off, either to Becker or to others who inquired on her behalf. These circumstances strongly suggest a discriminatory motive for the refusal to rehire Becker.[8]

At the hearing in this case, Respondent, for the first time, offered the following explanation, through the testimony of Hinrichsen, for its refusal to rehire Becker. Hinrichsen testified that, after Breece brought Becker's application to Hinrichsen because it indicated Becker's ''falling out'' with the Union, he focused on Becker's opening statement on her application that she had earned $50 per day when she was taking notes on behalf of the Unions' bargaining with Respondent. According to Hinrichsen, he then instructed one of his assistants, Steve Workman, to find out whether Becker had collected unemployment compensation after she left Respondent and whether she reported any earnings for 1992. Some time later, again according to Hinrichsen, Workman reported back that Becker had collected unemployment compensation and did not report any earnings from the Union. Hinrichsen, in turn, reported this to Breece and ordered that Becker not be rehired because she is dishonest in collecting unemployment compensation while collecting remuneration for taking notes at the negotiating sessions.

I reject Hinrichsen's testimony on this matter as completely unreliable. I find his reason to be a pretext. Neither Breece nor Workman testified to corroborate Hinrichsen. Nor did Hinrichsen see, ask for, or consider any contemporary documentation that would support Workman's oral report to him that Becker had done anything improper. Indeed, Hinrichsen gave confusing and conflicting testimony about Workman's report. He testified, at one point, that Workman did not tell him the source of his information; but, shortly thereafter, he testified that he thought Workman told him he received his information from the Gibbons Company, a firm that represents Respondent in unemployment matters. The actual information by Gibbons Co. was not provided in this proceeding. Hinrichsen was also evasive and failed to adequately explain why Breece would have brought Becker's application to him in the first place. This deviation from normal practice and procedure is another indication of proscribed motive. And his explanation why he hit upon possible unemployment fraud when Becker's application was

[7] I do not credit Hinrichsen's denial that McCammon asked him why Becker had not been rehired. Hinrichsen conceded that he may have had a conversation with McCammon about Becker, but he could not recall the specifics of the conversation. McCammon's more detailed testimony that he made the inquiry and Hinrichsen did not respond, is more credible. It is also consistent with Hinrichsen's failure to tell Becker and the others who spoke on her behalf not only why he was not rehiring her but even that he had definitely decided not to do so. Nor do I credit Hinrichsen's implausible testimony that he told Becker's husband to have her see him about her application. By then he had already decided not to hire her. I have no doubt that, if the message Hinrichsen claimed he sent through her husband had been transmitted to Becker, she would have complied. Hinrichsen's testimony in these respects is not credible because of his general unreliability on the entire Becker matter, which I discuss more fully below. Finally, Hinrichsen's demeanor alone warrants not crediting his testimony. He did not appear forthright.

[8] Respondent's claim that its decision was free of union animus because it treated other known union supporters favorably is without merit. Many of the union activists and shop stewards listed by Respondent had retained reinstatement rights. Moreover, is well settled an Employer's failure to discipline other union activists, or its favorable treatment of some union supporters, does not undermine the conclusion of unlawful motivation as to a particular employee. See *NLRB v. McCullough Environmental Services*, 5 F.3d 923, 937 (5th Cir. 1993); *Clark & Wilkins Industries v. NLRB*, 887 F.2d 308, 316 fn. 19 (D.C. Cir. 1989).

presented to him does not ring true. He had known for 2 years that Becker was taking bargaining notes for the Unions that were negotiating with the Respondent. He could not have thought she was doing this gratis, especially after his sharp exchange with Becker about who was paying each of them. And he must have known that she received unemployment compensation after she was laid off because that fact was reported contemporaneously to Respondent. Finally, if Hinrichsen were truly concerned about unemployment compensation fraud, it would seem that he would have reported the matter to the appropriate state authorities or at least offered to hear Becker's side of the story. Instead, he failed to tell Becker or the others who inquired on her behalf why he decided not to rehire her or even that he had decided definitely not to rehire her. In these circumstances, I find that his belatedly offered reason was a pretext. *Gossen Co. v. NLRB*, 719 F.2d 1354, 1359 (7th Cir. 1983).[9]

Respondent's contention that Becker's own testimony demonstrates some impropriety in collecting unemployment compensation is unavailing. Hinrichsen failed to convincingly demonstrate he knew and relied on, such information she was dishonest when he made his decision not to rehire Becker. Moreover, neither Becker's testimony nor any other evidence shows Becker did anything improper. She openly listed her earnings on her job application. And, at the hearing, she credibly testified that her first check from the Union did not account for withholding or deductions. She asked the Union's office manager, Marge Harris, about this, and Harris told her that Becker was responsible for taking care of withholding and deductions. Becker then went both to the Internal Revenue Service and the state unemployment office that same day, explained the situation and closed her unemployment claim. She later reopened her claim when she stopped taking notes for the Unions' bargaining with Respondent.[10] This testimony was unrefuted. In contrast Hinrichsen could not decipher Becker's unemployment statement. See generally *Holly Farms*, 311 NLRB 273 (1993).

In these circumstances, I find that a reason for Respondent's refusal to rehire Becker was her concerted protected union activities and the reason offered by Respondent was a pretext. Respondent has failed to credibly rebut the General Counsel's showing Becker's protected concerted activities were a motivating factor in its refusal to rehire her. *W. R. Case & Sons Cutlery*, 307 NLRB 1457, 1463 (1992). Accordingly, I find Respondent violated Section 8(a)(3) and (1) of the Act. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v Transportation Management Corp.*, 482 U.S. 393 (1983); *Flour Daniel, Inc.*, supra, 311 NLRB 498. Thus, Respondent's motion to dismiss this allegation is denied.[11]

3. The discharge of Mary Anderson

Employee Mary Anderson was discharged on April 15, 1994, while a union steward. The General Counsel concedes that her ''union activities did not rise to the level of Nancy Becker's.'' However, she did picket during the October 1992 strike. There was testimony that CEO Vortmann's car hit her while she was on the picket line. But, he later apologized, and there is no evidence this was done deliberately. Anderson also participated in several union rallies and demonstrations. She distributed whistles to employees arriving for work in March 1993. On that occasion, Hinrichsen made a comment to Chief Steward McCammon which clearly referred to Anderson, the only female union shop steward in the shipyard at that time. He said that her whistle was defective because she had been blowing the ''rape'' whistle for half an hour and ''still hadn't been raped yet.''

Sometime early in 1993, Anderson failed a drug test and was placed in the Respondent's employee assistance program (EAP). Anderson signed an EAP agreement, whereby she agreed to be subjected to random testing for alcohol and drugs. In late March 1993, Anderson failed a random drug test and was terminated for this reason on March 30, 1993. She filed a grievance and an unfair labor practice charge over the termination. Both the grievance and the unfair labor practice charge were ultimately settled with Anderson being reinstated, subject to another EAP agreement that was, in effect, a ''last-chance'' agreement. Anderson again agreed to be subjected to random testing for a 1-year period. The agreement provided that ''any positive drug test'' would be grounds for ''immediate discharge.'' Anderson returned to work under this settlement in August 1993.

After her return to work Anderson was subsequently tested a number of times. On March 30, 1994, she was subjected to another random test, which she failed. On April 5, 1994, 5 days' later, Anderson was called into Hinrichsen's office. This was at about 2 p.m., near the end of her shift at 3 p.m. Hinrichsen told her that she tested positive on her last ''drug screen,'' a fact that is undisputed.

There is some conflict in the testimony concerning what was said next. According to Anderson's direct testimony, she asked what the drug screen showed and Hinrichsen said, ''THC.''[12] Anderson then said, ''I have not smoked—I will go and take a test right now, immediately. I will be happy to retest. I have not smoked.'' Anderson testified that, at this point, Hinrichsen left the room for a while, and then returned and said, ''We may want you to do that.'' Anderson then said, ''I've been on this program for eight months. I know I'm being tested all the time, and why would I blow it?—I've got only four months to go.'' Hinrichsen replied, ''Only you and God know that.'' At this point, Hinrichsen said that he needed to think about it, and instructed Anderson to go

[9] I find wholly incredible Hinrichsen's explanation for keeping secret his supposed reason for not rehiring Becker. He testified he remained silent because he believed that his reason should be kept confidential. It is difficult to see how confidentiality could justify keeping the reason secret from Becker's husband or her bargaining representative. But there is absolutely no justification for keeping it secret from Becker herself. Neither Workman or Breece testified.

[10] Respondent submitted several documents that purported to show otherwise, but failed to demonstrate they proved wrongdoing by Becker. Indeed, Hinrichsen was unable, intelligibly, even to explain or understand what the documents meant, including one of them which had been prepared shortly before the trial.

[11] It is well settled that if the Respondent's reason for its action is pretextual, that fact supports the General Counsel's showing of discrimination and defeats any attempt by Respondent to show it would have acted the same way absent discrimination. See *Greyhound Lines*, 319 NLRB 554, 575 (1995), and cases there cited.

[12] The presence of ''THC'' is indicative the test subject recently consumed marijuna.

back to work and finish out the day, and to telephone him at 8:30 a.m. the next morning. Anderson asked what she should tell her supervisor. Hinrichsen said, ''Don't say anything to him.'' Then Anderson asked, ''What about when I don't come in tomorrow?'' According to Anderson, Hinrichsen replied, ''Don't talk to anyone. Go to work. Finish your shift. Call me in the morning at 8:30.'' On cross-examination, Anderson testified that she had asked what she should tell her supervisor only after Hinrichsen had told her ''not to talk to anyone.'' This version was confirmed by Anderson's pretrial affidavit, which, she claimed at the hearing, was mistaken. Hinrichsen did not dispute much of Anderson's testimony, but he denied that he told Anderson not to discuss the results of her drug tests ''with anyone.''[13]

The above exchange allegedly amounted to a prohibition against Anderson talking about her drug test with fellow employees or union representatives, in violation of Section 8(a)(1) of the Act. The General Counsel has not established this alleged violation by a preponderance of the credited testimony. First of all, Anderson was generally unreliable as a witness, which I discuss in more detail later in this decision. Moreover, she did not feel constrained from discussing the matter with Chief Steward McCammon, a fellow employee, immediately after the Hinrichsen meeting. This suggests that Hinrichsen did not order Anderson not to discuss her drug test with anyone. I find it more likely that Hinrichsen simply responded to Anderson's question about what she should tell her supervisor by stating that she should tell him nothing. I do not believe he said anything further about not speaking to anyone.

Even if Anderson's testimony were accepted, however, the exchange seems ambiguous. There was no suggestion that Anderson not pursue union or concerted remedies. Indeed, she did not so construe Hinrichsen's remarks as borne out by her own testimony that she spoke with McCammon immediately after the Hinrichsen meeting and with Business Agent Godinez the next day. Thus, if Hinrichsen did say anything about not talking to anyone about the matter, it seems likely that he was referring to the confidential nature of their discussion which dealt with drug testing and the EAP program. Anderson's reaction confirms this assessment of his remarks. In these circumstances, I recommend this allegation of the complaint that Respondent violated Section 8(a)(1) of the Act by prohibiting Anderson from talking to her union representative or other employees about her drug test be dismissed and grant Respondent's motion to dismiss the allegation.

Anderson did not call Hinrichsen on April 6, 1994. Instead she attempted to see him that morning, then left the premises to obtain her own drug test. On April 15, 1994, she participated in a prearranged meeting with Business Agent Godinez and Hinrichsen. Anderson presented the results of her drug test, which were negative, but Hinrichsen nevertheless notified her that she was being terminated for violating her EAP agreement. Hinrichsen told Anderson that her test was not as reliable as Respondent's March 30 test. Hinrichsen said that Respondent's test had been done with ''gas chromatography'' and that Anderson's had not. Nor had the sample in Anderson's test been taken in accordance with Federal requirements. The reliability of Respondent's test was confirmed through the testimony of Robert West, the director of forensic toxicology at Poison Lab, Inc., in San Diego, California, which conducted Respondent's testing. Hinrichsen also gave as a reason for her termination that Anderson had not followed directions to call him the day after their April 5 meeting.[14]

The General Counsel has failed to show by a preponderance of the credible evidence that Anderson was discharged because of her union or protected concerted activities. Although Anderson was a known union adherent and steward, there is no significant evidence of animus directed at her that would lead to an inference that her discharge was motivated by discrimination. In particular, I reject any suggestion that Hinrichsen harbored animus against Anderson when he objected to her acting as a union steward after her reinstatement in August 1993. According to Business Agent Godinez, Respondent and the Union agreed that, upon her reinstatement, Anderson would not serve as a shop steward for 60 days. Several months after she was reinstated, however, the Union proposed that she be reappointed a steward for a certain work area. Hinrichsen initially disagreed, because he believed she had been appointed to cover a work area in which she was not working, which would have been improper. Eventually, the matter was resolved and Anderson was permitted to resume her union steward duties. Business Agent Godinez recognized Hinrichsen's right to object to Anderson on the ground he advanced, and it was not shown that Hinrichsen deviated from past practice in initially objecting to Anderson's appointment.

Nor do the circumstances of the discharge support a finding of discrimination. Anderson failed a drug test in violation of a ''last chance'' EAP agreement that provided for her immediate discharge should she fail another drug test. This was the third drug test she failed in the space of a little over 1 year. Respondent regularly terminated employees for failing drug or alcohol tests and violating the terms of EAP agreements. There is no showing Respondent treated Anderson differently than it would other employees who had or would have failed a drug test pursuant to a ''last chance'' EAP agreement. Hinrichsen had the right to reject Anderson's separately secured drug test taken some 6 days after the reliable one she had failed. By then, so much time had passed since the Respondent's test was taken that her test would not have refuted the results of the earlier test. Moreover, the evidence shows that Respondent's test was more reliable, as Hinrichsen claimed. Finally, Anderson admittedly did not call Hinrichsen, as he had instructed. In these circumstances, I find that the General Counsel has not proved that a reason for the discharge was Anderson's protected concerted activity.

The General Counsel argues that Hinrichsen did not summarily discharge Anderson on April 5 after notifying her that

[13] Under the EAP program, the entire matter of drug testing is handled confidentially.

[14] Although most of the above was based on the testimony of Anderson and Godinez, neither were reliable witnesses. Anderson was not attempting to be candid. Anderson appeared to be attempting to contrive her testimony to her advantage. Godinez, who did not corroborate Anderson in some respects, was no more reliable. He was not forthright, and, at times, was unresponsive. He also seemed to engage in surmise and embellished his testimony. Accordingly, I cannot credit their testimony about Anderson's discharge unless it is against their interests.

she had failed the March 30 drug test, as he could have, but only did so 10 days' later, after she had invoked the help of her union representative, thus demonstrating union animus was his motive. I do not find this argument meritorious. That Hinrichsen waited to see whether Anderson and her union representative could persuade him that he should not act on the evidence he had does not demonstrate improper motive. On the contrary, Hinrichsen's actions demonstrate he was willing to permit Anderson and the Union to present their position. Once the Union got involved, it was reasonable for Respondent to wait for the meeting that the Union arranged before taking action.[15] Respondent was not presented with Anderson's test until April 15, the day of the meeting and the discharge. Indeed, that Respondent did not act out of a discriminatory motive is shown by Hinrichsen's agreement during grievance meetings after the discharge, to submit the original sample to a retest by an independent laboratory, which would bind both parties to its result. The Union declined to have the retest be outcome determinative. I find nothing in Respondent's handling of the discharge that would support an inference of discrimination.

Assuming arguenda, I concluded the General Counsel had proved that a reason for Respondent's action was discriminatory, I also find, for the reasons set forth above, that Respondent would have discharged Anderson even in the absence of her protected activity. The General Counsel failed to show Respondent treated Anderson disparately. It is undisputed that Anderson failed the March 30, 1994 drug test, which justified an immediate discharge. That test was reliable and was the third failed drug test for Anderson in little over a year. Accordingly, I recommend the dismissal of the allegation that Respondent's discharge of Anderson violated Section 8(a)(3) and (1) of the Act. Respondent's motion to dismiss these allegations of the complaint is granted.

CONCLUSIONS OF LAW

1. By discriminatorily refusing to rehire employee Nancy Becker because of her protected concerted and union activities, Respondent violated Section 8(a)(3) and (1) of the Act.
2. The above violation is an unfair labor practice affecting commerce within the meaning of the Act.
3. Respondent has not otherwise violated the Act as alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

I shall recommend that Respondent immediately offer employment to Nancy Becker in a burner or torch operator's position or, if that position is not available, to a substantially equivalent position. Further, Respondent shall be directed to make her whole for any and all losses of earnings and other rights, benefits, and privileges of employment she may have suffered by reason of Respondent's discrimination against her, with interest. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

The Respondent, National Steel and Shipbuilding Company, San Diego, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to hire or rehire Nancy Becker or any other individual because they engaged in union or other protected concerted activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this order, offer Nancy Becker a burner or torch operator's position or, if that position is not available, to a substantially equivalent position, without prejudice to seniority or any other rights or privileges to which she may be entitled and remove from its files any references to the unlawful refusal to rehire her and within 3 days thereafter notify the discriminatee in writing that this has been done and that it will not be used against her in any way.

(b) Make Nancy Becker whole for any and all losses incurred as a result of Respondent's unlawful discrimination against her, with interest, as provided in the remedy section of this decision.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this order.

(d) Within 14 days after service by the Regional Director, post at its San Diego, California shipyard, copies of the attached notice marked ''Appendix.''[17] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken the by the Respondent to ensure that the notices are not altered, defaced, or covered by other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these pro-

[15] Hinrichsen's actions regarding Anderson are a stark contrast to his failure to reveal, no less discuss, his avowed reason for not rehiring Becker. This disparity in approach provides further basis for my determination Respondent's reason for not rehiring Becker is a pretext.

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

ceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since December 23, 1994.

(e) Within 21 days after service by the Regional Director, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.